BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RONALD TANKARD	)	
Claimant	)	
V.	)	
	)	AP-00-0467-621
SPIRIT AEROSYSTEMS, INC.	)	CS-00-0162-193
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier (Respondent) requested review of the May 12, 2022, Award by Special Administrative Law Judge (SALJ) Mark E. Kolich. The Board heard oral argument on August 25, 2022.

APPEARANCES

Phillip B. Slape appeared for Claimant. Kirby A. Vernon appeared for Respondent. Terry J. Torline appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the SALJ, consisting of the transcript of Regular Hearing held May 17, 2021; the transcript of the Preliminary Hearing held August 22, 2019, with exhibits attached; the transcript of the Continuation of Regular Hearing by Deposition of Ronald Tankard from June 1, 2021; the transcript of the Evidentiary Deposition of Terrence Pratt, M.D., from August 15, 2019, with exhibits attached; the transcript of the Deposition of Pedro Murati, M.D., from June 15, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Justin Strickland, M.D., from June 23, 2021, with exhibits attached; the transcript of the Deposition of Terrence Pratt, M.D., from July 26, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Daniel J. Prohaska, M.D., from August 19, 2021, with exhibits attached; and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. Is the alleged repetitive trauma the prevailing factor causing Claimant's condition and need for medical treatment?

2. What is the nature and extent of Claimant's disability?

3. The constitutionality of K.S.A. 44-510d(b)(23)?

4. What, if any, is the liability of the Fund?

FINDINGS OF FACT

Claimant worked as a drivematic machine operator for Respondent (formerly Boeing Aerospace Company) for 33 years. In this position, Claimant loaded airplane parts of various sizes and weights onto his table to run through a machine. Over a period of time, Claimant developed pain in his right shoulder, and on March 21, 2013, was sent to Spirit Medical Clinic by Respondent. He reported problems with right shoulder pain gradually developing over the 8 to 9 months prior to March 21, 2013. An MRI of Claimant's right shoulder was obtained March 21, 2013, and revealed a small rotator cuff tear. Claimant was provided medication and physical therapy, but was not taken off work or placed on restricted duty. Claimant stated the physical therapy helped for a time, but he felt his shoulder pain gradually returned 7 to 8 months after physical therapy ended.

Claimant's pain continued to worsen each working day until it was intolerable, and he again reported his right shoulder issues to Respondent on August 10, 2018. Claimant was sent back to the plant medical clinic. Another MRI of Claimant's right shoulder was taken September 4, 2018.

Claimant was referred to Dr. Daniel Prohaska through the Spirit Medical Clinic. Dr. Prohaska examined Claimant on September 11, 2018, and determined Claimant had a chronic irreparable massive rotator cuff tear with significant atrophy and retraction. Dr. Prohaska described the September 4, 2018 MRI as showing:

> . . . a rotator cuff tear involving two of the four tendons of the rotator cuff, which showed that the tendons, where they normally attach, had pulled away and retracted to the level of the shoulder socket, the glenoid. The MRI also showed

> significant fatty atrophy of the muscles of those two groups of the rotator cuff, which indicates a long-standing problem.[1]

Dr. Prohaska recommended permanent restrictions of no overhead work and no lifting over 20 pounds. Dr. Prohaska found Claimant to be at maximum medical improvement, writing, "No further active medical treatment is needed to resolve this work injury to its fullest extent possible."[2]

Dr. Prohaska provided a causation opinion on November 2, 2018, finding Claimant's August 10, 2018, repetitive trauma was not the prevailing factor causing Claimant's right shoulder condition. Instead, Dr. Prohaska explained Claimant's condition is a chronic, over 5 to 10-year process in the shoulder and does not meet the prevailing factor standard. Dr. Prohaska opined the 2018 tear is a natural and probable consequence of the 2013 small tear.

Dr. Pedro Murati examined Claimant at his counsel's request on November 27, 2018. Claimant's chief complaints were constant pain in his right shoulder radiating into his neck and upper back, numbness and tingling in his right upper extremity with overhead reaching, and difficulty sleeping due to pain. Dr. Murati reviewed Claimant's medical records, history, and performed a physical examination. Dr. Murati noted Claimant sustained a right shoulder rotator cuff tear consistent with his MRI and was a direct result of his repetitive trauma at work. Dr. Murati recommended further medical treatment. He wrote:

> There is significant new and distinct anatomical change when comparing the MRIs of the right shoulder performed in 2013 to the one completed in 2018. He has significant clinical findings that have given him diagnoses consistent with his described multiple repetitive traumas at work. Apparently, on this examinee's date of injury he sustained enough permanent structural change in the anatomy of his right shoulder which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of his conditions is the multiple repetitive traumas at work.[3]

Dr. Terrence Pratt examined Claimant for a court-ordered independent medical evaluation on April 2, 2019. Claimant's chief complaint was continuous right shoulder aching and locking, with stiffness, weakness, and intermittent numbness. Dr. Pratt took

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[1] Prohaska Depo. at 6.

[2] *Id.*, Ex. 2 at 4.

[3] Murati Depo., Ex. 2 at 5.

a history from Claimant, which included a specific traumatic incident occurring in 2013. Claimant denied describing a specific event in 2013 to Dr. Pratt.

Dr. Pratt reviewed Claimant's medical records and performed a physical examination, finding Claimant sustained right shoulder syndrome with full-thickness rotator cuff tears with retraction and atrophy, and findings suggesting a labral tear and degenerative changes. Dr. Pratt recommended Claimant undergo an evaluation with a specialist, though not as a result of the August 2018 work event. Dr. Pratt concluded:

> The prevailing factor for [Claimant's] shoulder involvement includes his reported vocationally related activities apparently in 2013 and subsequent chronic involvement of the shoulder. The 2018 event is not the prevailing factor for the involvement but was in the aggravating event for the shoulder. The MRI noted atrophy and retraction with rotator cuff tears.[4]

During his August 2019 deposition, Dr. Pratt reviewed additional medical records and acknowledged Claimant sustained repetitive trauma in 2013 as opposed to a specific event. Dr. Pratt testified the structural changes noted in Claimant's 2018 MRI preexisted Claimant's work activities in August 2018.[5] Dr. Pratt agreed Claimant's right shoulder symptoms could have been caused by 33 years of repetitive overuse of the shoulder, but the prevailing factor would be more specific to repetitive activities from 2013 forward. Dr. Pratt explained:

> A. When we say prevailing factor for the structural changes of his shoulder would be his 2013 event with rotator cuff involvement and degeneration at that time which progressed between 2013 to 2018 resulting in structural changes of his shoulder, or more significant structural changes.[6]
>
> . . .
>
> Q. If there was no one-time trauma in 2013, what would your opinion today be concerning prevailing factor?
>
> A. That it relates to his repetitive activities that resulted in symptoms in 2013 and continuing thereafter.[7]

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[4] Pratt Depo. (Aug. 15, 2019), Ex. A.1 at 4.

[5] *See* Pratt Depo. (Aug. 15, 2019) at 23.

[6] *Id*. at 14-15.

[7] *Id*. at 17.

Dr. Pratt also stated:

> 2013 was the initial event. August 2018 was when he reported he had a second . . . event, but that reported activities in August of 2018 did not result in the structural changes of his shoulder. The structural changes were present preexisting that.[8]

Dr. Pratt agreed the rotator cuff tear worsened between 2013 and 2018. Dr. Pratt testified:

> Q. Do you believe that at some point in time between 2013 and 2018 that rotator cuff, the rip in the rotator cuff increased in size?
>
> A. Between 2013 and 2018?
>
> Q. Yes.
>
> A. There was a change in his rotator cuff involvement between those periods of time where the rotator cuff involvement worsened, yes.
>
> Q. When you're saying worsening, does that mean that there's a larger tear in the rotator cuff?
>
> A. Yes.
>
> Q. Or more extensive tear in the rotator cuff?
>
> A. More extensive tear in the rotator cuff.[9]

When asked about the relationship of the worsening shoulder problems, Dr. Pratt testified:

> Q. Doctor, the progression that you're describing, was that progression caused by his repetitive work duties between 2013 and 2018?
>
> A. If it's true that he continued to perform the same activities that caused his 2013 involvement, then continuing those activities resulted in progression as worsening of the underlying involvement.[10]

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[8] *Id*. at 13.

[9] *Id*. at 23.

[10] *Id*. at 25.

Claimant requested authorized medical treatment at a preliminary hearing held August 22, 2019. The ALJ denied Claimant's request, specifying his denial was based on Dr. Pratt's report. Claimant appealed the decision to the Board, which reversed the ALJ's decision on August 21, 2020.[11] A Board Member found:

> Based upon Dr. Pratt's testimony, the prevailing factor for claimant's shoulder condition is the work activities claimant performed for respondent before and after 2013. When asked his prevailing factor opinion, assuming there was no one-time trauma in 2013, Dr. Pratt stated the structural changes of claimant's shoulder related to his repetitive activities resulting in symptoms in 2013 and continuing thereafter.
>
> Even if claimant suffered a compensable injury in 2013, the evidence presented supports finding claimant suffered a change in the physical structure of his shoulder associated with repetitive work activities performed after 2013. Both Drs. Murati and Pratt found claimant's rotator cuff tear was larger in 2018 than it was in 2013. Dr. Pratt specifically stated the continuing work activities resulted in worsening of the underlying involvement, i.e., rotator cuff tear. The change in his physical condition caused by subsequent work activities would also be compensable.
>
> The undersigned finds claimant's shoulder condition is the result of repetitive trauma, the beginning of which pre-dates the 2013 medical treatment, related to his repetitive work activities while working for respondent.[12]

Preliminarily, Dr. Justin Strickland was appointed Claimant's authorized treating physician and began treatment on September 21, 2020. Dr. Strickland found Claimant had an irreparable rotator cuff tear of the right shoulder and eventually performed a reverse total shoulder arthroplasty on October 22, 2020. Claimant followed surgery with additional treatment before Dr. Strickland found him to be at maximum medical improvement on February 26, 2021. Dr. Strickland provided permanent restrictions of no lifting more than 25 pounds with the right upper extremity.

In a letter dated March 22, 2021, Dr. Strickland indicated future medical should be left open for Claimant's right shoulder. Dr. Strickland was not specific regarding the nature of future medical treatment. He determined, using the AMA *Guides*,[13] Claimant sustained 25 percent permanent impairment to the right upper extremity as a result of his work injury. Dr. Strickland did not break down the specific elements of his impairment opinion.

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[11] *Tankard v. Spirit Aerosystems, Inc.*, No. AP-00-0451-027, 2020 WL 5350583 (Kan. WCAB Aug. 21, 2020).

[12] *Id*. at 5-6.

[13] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

On April 7, 2021, Dr. Murati again examined Claimant, finding Claimant sustained loss of motion of the right shoulder when measured with a goniometer. He provided an impairment rating of combined 39 percent impairment to the right upper extremity using the AMA *Guides*. Dr. Murati assessed 17 percent impairment for loss of range of motion, 24 percent impairment for the right shoulder reverse arthroplasty, and 3 percent impairment for dysesthesia of the right axillary distribution. Dr. Murati explained he began with 24 percent impairment based upon the AMA *Guides* as a starting point, but his rating opinion deviates from a strict interpretation when assessing all of Claimant's damaged anatomical structures.

Dr. Murati admitted the AMA *Guides* does not permit the combination of loss of motion impairment with diagnosis impairment, but he felt it necessary to obtain an accurate assessment of Claimant's impairment. Dr. Murati testified:

> Well, you know, that's why the Sixth Edition – I mean, the Supreme Court of Kansas in their infinite wisdom told us to use the Sixth Edition as a starting guide and to use our own experience in dealing with these subjects. As you see, there are contradictions in the Sixth Edition. Why should a normal motion arthroplasty be worth more than a great deal of loss of range of motion? That does not make any sense. That does not compute. So I'm using the Guides as exactly that, a guide. It tells me that a normal arthroplasty – a range of motion – a normal range of motion arthroplasty is twenty-four percent. Well, if that's the case, any deviation to the more pathology, such as loss of range of motion, should be worth more, and the best way I have to rate that is using the range of motion tables in the Sixth Edition.[14]

SALJ Kolich concluded claimant sustained a compensable right shoulder injury by repetitive trauma. SALJ Kolich also found Dr. Murati more credible than Dr. Strickland on the nature and extent of claimant's impairment, and should be based on competent medical evidence, as well as the AMA *Guides*. SALJ Kolich found Claimant sustained 39 percent permanent impairment of function to his right shoulder and is entitled to future medical treatment. The SALJ dismissed the Fund from liability because Claimant suffered a compensable injury. Further, the SALJ determined there is no reason to order Respondent to pay the Fund's attorney fees and denied the Fund's request.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant's right shoulder condition is a natural and probable consequence of a preexisting condition, and the claim should be denied. Alternatively, Respondent maintains Claimant sustained 25 percent functional impairment to his right shoulder. Respondent argues it is entitled to reimbursement by the Fund for all medical expenses and temporary total disability benefits provided after August 21, 2020, pursuant

[14] Murati Depo. at 26.

to K.S.A. 44-534a(b). Finally, Respondent argues Claimant waived his right to contest the constitutionality of K.S.A. 44-510d(b)(23) because Claimant did not raise the issue at the regular hearing.

Claimant contends the SALJ's Award should be affirmed. Claimant argues he is statutorily allowed judicial review of the constitutionality of K.S.A. 44-510d(b)(23) without raising it before the Board or SALJ because both the Board and the SALJ lack jurisdiction to hear the issue.

The Fund argues the SALJ's Award should be affirmed.

1. Is the alleged repetitive trauma the prevailing factor causing Claimant's condition and need for medical treatment?

K.S.A. 2018 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2018 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant's job involved constant lifting and moving of parts weighing 10 to 76 pounds. Respondent does not contest claimant's job involved repetitive work.

Respondent argues an MRI of Claimant's right shoulder taken March 21, 2013, revealing a small rotator cuff tear is proof of a preexisting condition. The Board finds Claimant's shoulder condition is the result of repetitive trauma, the beginning of which predates the 2013 medical treatment, related to his repetitive work activities while working for respondent.[15] The small rotator cuff tear is a part of the ongoing repetitive trauma, culminating in an injury by repetitive trauma on September 10, 2018.

The Board agrees with its prior finding: claimant's repetitive trauma began before 2013 and progressively worsened with continued work. Claimant performed the same job prior to 2013 and through 2018. Dr. Pratt opined if Claimant continued to perform the

[15] *Tankard, supra,* at 6.

same activities that caused his 2013 injury after 2013, the work activities resulted in progression of the injury, and worsening of the underlying injury. The torn rotator cuff found in 2013 was part of the progressive injury caused by repetitive trauma that continued through September 7, 2018. Comparison of the two MRI studies confirm Claimant suffered a change in the structure of the shoulder by ongoing repetitive trauma.

2. What is the nature and extent of Claimant's disability?

K.S.A. 44-510d states, in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto.
>
> . . .
>
> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
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> . . .
>
> (23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

When a workers compensation statute is plain and unambiguous, the Board must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[16]

In *Johnson v. U.S. Food Serv.*, the Supreme Court wrote:

> The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *In re Joint Application of Westar Energy & Kansas Gas and Electric Co.*, 311 Kan. 320, 328, 460 P.3d 821

[16] *Bergstrom v. Spears Mfg. Co.,* 289 Kan. 605, 608, 214 P.3d 676 (2009).

> (2020). In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. 311 Kan. at 328, 460 P.3d 821. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. See *In re Westar Energy*, 311 Kan. at 328, 460 P.3d 821.[17]

The ruling in *Johnson* was based on the plain language of K.S.A. 44-510e, not K.S.A. 44-510d.[18]

In *Butler v. The Goodyear Tire and Rubber Company*,[19] the Board ruled:

> The language mandating the use of the AMA *Guides* in K.S.A. 44-510e(a)(B) is different than the language of K.S.A. 44-510d(b)(23), which says impairment of function related to a scheduled injury shall be determined using the Sixth Edition, if the impairment is contained therein. K.S.A. 44-510d(b)(23) does not contain the phrase "competent medical evidence."
>
> The plain language of K.S.A. 44-510d(b)(23) requires the functional impairment to be based upon the Sixth Edition. There is no requirement the impairment rating be based upon any other criteria, including substantial competent evidence.
>
> The ALJ was correct in concluding he was bound by the Sixth Edition when assessing functional impairment under K.S.A. 44-510d(b).

As the SALJ stated in his Award, "Table 15-5 of the 6th Edition allows a range of 20% to 25% with a default percentage of 24% for a total shoulder arthroplasty with normal motion."[20] Dr. Strickland's impairment rating of 25 percent is consistent with the Sixth Edition. Dr. Murati's statement he used the 24 percent default percentage as a starting point is also consistent with this table. Under the AMA *Guides*, the Board finds claimant's functional impairment is 25 percent.

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[17] *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 600-01, 478 P.3d 776, 779 (2021).

[18] *See id.*

[19] *Butler v. The Goodyear Tire and Rubber Company*, No. AP-00-0456-096, 2021 WL 2287732 (Kan. WCAB May 27, 2021).

[20] SALJ Award at 8 (emphasis added in original).

The Board is required to apply clearly-worded statutes as written.[21] The plain language of K.S.A. 44-510d(b)(23) states permanent partial disability shall be based solely under the AMA *Guides* without independent consideration of competent medical evidence. The only impairment rating in the record based solely upon the AMA *Guides* is from Dr. Strickland. Dr. Murati considered other competent medical evidence in assessing permanent impairment and opined he could deviate from the AMA *Guides*. Dr. Murati's rating does not comport with K.S.A. 44-510d(b)(23). Pursuant to *Butler*, and the plain language of K.S.A. 44-510d(b)(23), the Board finds Dr. Strickland's opinion more persuasive. Claimant suffers 25 percent impairment to the upper extremity at the level of the shoulder.

3. The constitutionality of K.S.A. 44-510d(b)(23)?

The Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.[22] The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. The Board does not have jurisdiction and authority to determine a statute is unconstitutional.[23] While a party must adequately brief a constitutional issue before the appellate courts, it is not necessary to raise a constitutional issue before the ALJ or the Board.[24]

4. What, if any, is the liability of the Fund?

K.S.A. 44-566a(e) states:

> The workers compensation fund shall be liable for:
>
> (1) Payment of awards to handicapped employees in accordance with the provisions of K.S.A. 44-569, and amendments thereto, for claims arising prior to July 1, 1994;
>
> (2) payment of workers compensation benefits to an employee who is unable to receive such benefits from such employee's employer under the conditions prescribed by K.S.A. 44-532a, and amendments thereto;

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[21] *See Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[22] *See, e.g., Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the Sixth Edition AMA *Guides* for a scheduled injury was unconstitutional as applied in that case only).

[23] *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

[24] *See, e.g.*, *Van Horn v. Blue Sky Satellite Services,* No. 122,188, 2021 WL 3124167 (Kansas Court of Appeals unpublished opinion filed July 23, 2021).

> (3) reimbursement of an employer or insurance carrier pursuant to the provisions of K.S.A. 44-534a, and amendments thereto, subsection (d) of K.S.A. 44-556, and amendments thereto, subsection (c) of K.S.A. 44-569, and amendments thereto, and K.S.A. 44-569a, and amendments thereto;
>
> (4) payment of the actual expenses of the commissioner of insurance which are incurred for administering the workers compensation fund, subject to the provisions of appropriations acts; and
>
> (5) any other payments or disbursements provided by law.

K.S.A. 44-556a(d)(1) states:

> If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer or the employer's insurance carrier during the pendency of review under this section and the amount of compensation awarded by the board is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation that the worker is entitled to as determined by the final decision on review. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection (d)(1), and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.

The Fund requests the Board affirm the SALJ's finding the Fund not liable and the Fund be dismissed as a party. This is a compensable claim. No compensation has been paid to Claimant by Respondent or the insurance carrier during the pendency of review. The Fund has no liability and is dismissed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of SALJ Mark E. Kolich, dated May 12, 2022, is modified with regard to the extent of Claimant's permanent impairment, which is reduced to 25 percent of the right upper extremity at the level of the shoulder, and affirmed in all other respects.

Claimant is awarded 0.14 weeks of total temporary disability at $645.00 per week, totaling $90.30; followed by 56.21 weeks of permanent partial disability at $645.00 per week, totaling $36,255.45; for a total award of $36,345.75; which shall be paid by

respondent, less any sums previously paid. As of the date of this Order, all compensation is due and owing.

IT IS SO ORDERED.

Dated this _____ day of November, 2022.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Member dissents. The majority conclusion K.S.A. 44-510d does not require competent medical evidence is incorrect.

K.S.A. 44-510d(23) states:

> Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 44-510e(a)(2)(B) states:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as

> established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The undersigned recognizes the obvious: K.S.A. 44-510e explicitly requires competent medical evidence; K.S.A. 44-510d does not mention the word "competent." However, the lack of such language in K.S.A. 44-510d does not rule out the need for competent medical evidence regarding scheduled injuries.

K.S.A. 44-510d(b)(24), when substituting the statutory definition of functional impairment reads:

> Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, [the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein] attributable to each scheduled member shall be combined pursuant to the fourth edition of the American medical association guides for evaluation of permanent impairment until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be combined pursuant to the sixth edition of the American medical association guides to the evaluation of permanent impairment, and compensation awarded shall be calculated to the highest scheduled member actually impaired.

There is no need for additional language telling the courts to base an impairment rating on competent medical evidence when the very definition of functional impairment necessarily includes such criteria. The statute merely instructs when to begin using the *Guides*, 6th ed. The statute does not provide a new definition of functional impairment which excludes the need for competent medical evidence.

The extent of functional impairment stemming from an unscheduled injury is determined by competent medical evidence, using the AMA *Guides* as a starting point, as noted in *Johnson*.[25] While *Johnson* concerns an unscheduled injury, there are many reasons to use competent medical evidence to assess impairment arising from a scheduled injury as well.

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[25] *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

Competent is defined as: 1. proper or rightly pertinent; 2. having requisite or adequate ability or qualities.[26] Competent is defined as "having suitable or sufficient skill, knowledge, experience, etc., for some purpose; properly qualified."[27]

Competency is required to support a medical opinion concerning a claimant's degree of functional impairment for a scheduled injury. All relevant and credible evidence should be competent. "[A medical] expert's conclusions, to be reliable, should be based on more than speculation."[28] "[Proof] in a workers compensation case must be based on substantial evidence and not on mere speculation."[29] "When the opinion of an expert witness is not within the witness's special knowledge, the testimony is speculative."[30] The Board should reject medical opinions based on "conjecture and speculation."[31] "[Proof] . . . must be such as to take the case out of the realm of speculation and conjecture."[32] Medical opinions should demonstrate "equivalent assurance that they were not based on either conjecture or speculation."[33]

The majority conclusion seemingly validates the concept an impairment rating for a scheduled injury may be based on *incompetent* medical evidence. Statutes are not meant to be read in a manner to reach absurd results: "we must construe statutes to avoid unreasonable or absurd results."[34] Inviting medical incompetence for an expert medical opinion is absurdly laughable.

"Competency" should be properly necessary in a medical opinion concerning a worker's permanent impairment of function as a result of a scheduled injury under K.S.A. 44-510d. The Workers Compensation Act requires a minimum quantum for reliability. The

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[26] https://www.merriam-webster.com/dictionary/competent

[27] https://www.dictionary.com/browse/competent

[28] *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 955, 379 P.3d 428 (2016).

[29] *Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 460-61, 263 P.3d 821 (2011).

[30] *Wiehe v. Kissick Const. Co.*, 43 Kan. App. 2d 732, 750, 232 P.3d 866 (2010).

[31] *Stepter v. LKQ Corp.*, No. 117,002, 2017 WL 4456730, at * 4 (Kansas Court of Appeals unpublished opinion dated Oct. 6, 2017).

[32] *Beachum v. Accessory City*, No. 111,350, 2015 WL 3514027 at *5 (Kansas Court of Appeals unpublished opinion dated May 22, 2015).

[33] *Turner v. State*, No. 110,508, 2014 WL 3022644, at *5 (Kansas Court of Appeals unpublished opinion filed June 27, 2014).

[34] *State v. Bodine*, 313 Kan. 378, 401, 486 P.3d 551 (2021).

general burden of proof in workers compensation matters is based on a preponderance of the evidence, or just over a 50% probability. See K.S.A. 44-508(h). A party failing to meet this minimal burden would not have presented sufficient proof. Failing to meet this minimal standard would not reflect proper, right, requisite or adequate qualities. The majority opinion, which endorses medically incompetent opinions, would not meet this low bar.

Of utmost import, the AMA *Guides*, 6th ed., must be used to formulate an impairment rating. The Kansas Court of Appeals recently stated:

> "[T]he Guides are not merely reference materials relied upon by physicians but are specifically referenced and required by the Act to be consulted when evaluating an impairment. . . . Given the Guides' incorporation into the Act, its use as a standard reference by physicians, the lack of a controversy concerning its contents, and the fact that the ALJ and Board are not strictly bound by the rules of evidence, it is "unnecessary for the AMA Guides to be introduced into evidence."[35]

While the *Guides* do not use the word "competency," the *Guides* specifically stress the need for words similar in meaning to competency in issuing an impairment rating:

> • "Precision, accuracy, reliability, and validity are critical issues in defining impairment." (*Guides*, p. 7)
>
> • "Examiners must exercise their ability to observe the patient perform certain functional tasks to help determine if self-report is accurate." (*Guides*, p. 10)
>
> • "[T]he evaluator must assess the validity and consistency of conventional information before assigning a rating." (*Guides*, p. 10)
>
> • "[T]o insure reliable impairment estimates, the assessing doctor must possess the requisite medical knowledge, skills, and abilities." (*Guides*, p. 19)
>
> • "Impairment evaluation requires medical knowledge." (*Guides*, p. 20; see also 23)
>
> • "A valid impairment evaluation report based on the *Guides* must contain the 3-step approach described in Section 2.7." (*Guides*, p. 20)

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[35] *Perez v. Nat'l Beef Packing Co.*, 60 Kan. App. 2d 489, 507, 494 P.3d 268 (2021).

• "The evaluating physician must use knowledge, skill, and ability generally accepted by the medical scientific community when evaluating an individual, to arrive at the correct impairment rating according to the *Guides*." (*Guides*, p. 20)

• "The *Guides* is based on objective criteria. The physician must use all clinical knowledge, skill, and abilities in determining whether the measurements, test results, or written historical information are consistent and concordant with the pathology being evaluated." (*Guides*, p. 20)

• "The physician must use all clinical knowledge, skill, and abilities in determining whether the measurements or test results are consistent and concordant with the pathology being evaluated." (*Guides*, p. 24)

• "The examiner must base impairment rating on objective factors to the fullest extent possible." (*Guides*, p. 24)

• "[I]n a legal proceeding, the physician's opinion when unsupported by established science can lead to challenges and cause needless frustration or anxiety for the physician and others." (*Guides*, p. 27)

• "The use of the *Guides* requires the physician to use the same skills, knowledge, and ability as in the therapeutic practice of medicine in the collection of data and making an accurate diagnosis." (*Guides*, p. 27)

• "The physician users of the *Guides* must use objective criteria and all available clinical knowledge, skill, and abilities in deciding whether the measurements and/or test results are consistent and concordant with the pathology being evaluated." (*Guides*, p. 28)

The descriptors used in the *Guides* are akin to competency:

"Valid" is defined as: "2a. well-grounded or justifiable : being at once relevant and meaningful . . . 3: appropriate to the end in view: EFFECTIVE.[36]

"Accurate" is defined as: "1: free from error especially as the result of care . . .[;] 2: conforming exactly to truth or to a standard : EXACT[;]providing accurate color 3: able to give an accurate result[;] an accurate gauge.[37]

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[36] https://www.merriam-webster.com/dictionary/valid

[37] https://www.merriam-webster.com/dictionary/accurate

"Reliable" is defined as: "1: suitable or fit to be relied on : DEPENDABLE[;] 2: giving the same result on successive trials"[38]

"Science" is defined as: "1a: knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method[;] b: such knowledge or such a system of knowledge concerned with the physical world and its phenomena : NATURAL SCIENCE[;] 2a: a department of systematized knowledge as an object of study . . .[;] b: something (such as a sport or technique) that may be studied or learned like systematized knowledge . . .[;] 3: a system or method reconciling practical ends with scientific laws . . .[;] 5: the state of knowing : knowledge as distinguished from ignorance or misunderstanding."[39]

"Accuracy" is defined as: "1: freedom from mistake or error : correctness . . .[;] 2a: conformity to truth or to a standard or model : exactness . . .[;] b: degree of conformity of a measure to a standard or a true value.[40]

"Precision" is defined as: "1: the quality or state of being precise : EXACTNESS; 2a: the degree of refinement with which an operation is performed or a measurement stated."[41]

"Skill" is defined as: "1a: the ability to use one's knowledge effectively and readily in execution or performance[;] . . . 2: a learned power of doing something competently."[42]

Therefore, an impairment rating assessed using the *Guides* must also be based on a physician's medical knowledge, skill, and abilities, in addition to validity, accuracy,precision, consistency, objectivity, medical science, measurements, test results, and medical records, not merely looking at the *Guides* and assigning a number. None of these terms remotely hint at "incompetency." These terms are roughly synonymous with competency. The wording used in the *Guides* demonstrate competency is required for any valid impairment rating opinion. Kansas law requires we use the *Guides* for any impairment rating under Kansas law, whether for a whole body injury or a scheduled injury.

Also, "[w]hen construing statutes, appellate courts must consider various provisions of an act *in pari materia* with a view toward reconciling and bringing the provisions into

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[38] https://www.merriam-webster.com/dictionary/reliable

[39] https://www.merriam-webster.com/dictionary/science

[40] https://www.merriam-webster.com/dictionary/accuracy

[41] https://www.merriam-webster.com/dictionary/precision

[42] https://www.merriam-webster.com/dictionary/skill

workable harmony if possible."[43] Along these lines, K.S.A. 44-508 states, "'Functional impairment' means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein." Scheduled injuries are functional impairment injuries. Because scheduled injuries are subject to the definition of functional impairment, any impairment for a scheduled injury needs to be based on "competent medical evidence," as based on the very definition of "functional impairment." The majority opinion avoids this statutory definition.

Another statute requires competent medical evidence. K.S.A. 44-516(b) states, "If at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be agreed upon by the parties."

Lastly, and of lesser import, while the Workers Compensation Act is said to be exclusive,[44] there are many instances of the appellate courts applying the Code of Civil Procedure to workers compensation matters.[45] Along these lines, K.S.A. 60-419 states, "As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he or she has personal knowledge thereof, or experience, training or education if such be required." In like token, K.S.A. 60-456(b) states, "If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case." These statutes require competency, not incompetency.

The statutory definition of any functional impairment requires medical competency, and the law requires use of the *Guides*, which in turn require validity, science, objectivity, skill and knowledge (all words pointing toward competency). The assumption the Legislature meant to allow incompetent medical opinions as valid evidence for scheduled injuries is simply wrong.

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[43] *City of Shawnee v. Adem*, 314 Kan. 12, 22, 494 P.3d 134 (2021).

[44] *See Acosta v. National Beef Packing Co.*, 273 Kan. 385, Syl. ¶ 5, 44 P.3d 330 (2002).

[45] *See Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 755, 986 P.2d 373, 375 (1999) (applying K.S.A. 60–206(a) to workers compensation claim); *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347, at *3-4 (Kansas Court of Appeals unpublished opinion filed June 13, 2008) (applying K.S.A. 60-234 and 60-237 to a workers compensation claim).

If we view competent medical evidence as pertaining to both scheduled and unscheduled injuries, assessment of the claimant's impairment requires a different approach than used by the Board. Both Drs. Strickland and Murati used the *Guides* as a starting point. Both doctors testified they used competent medical evidence or their opinions were based on competent medical evidence. Dr. Strickland testified he considered the claimant's examination and surgical result. Dr. Murati testified he used the *Guides* as a guide. Dr. Murati acknowledged the *Guides* instruct physicians not to combine a range of motion impairment with a diagnosis-based impairment. However, Dr. Murati noted the diagnosis-based rating of 24% under the *Guides* was for a shoulder arthroplasty with resulting normal range of motion, which the claimant does not have, so he opined the *Guides* were contradictory and the claimant's impairment should be based on the surgical procedure and other residuals, such as lost range of motion and loss of sensation.

The undersigned would prefer the Board consider competent medical evidence in assessing the claimant's impairment, in lieu of solely following the *Guides*. The Board's opinion is based solely on the *Guides*, and without any attention to competent medical evidence. A better approach is noted in *Garcia*,[46] which states:

• "deficiencies in the assessment equation are unavoidable[;]"[47]

• each individual case of impairment is determined "not by strict adherence to the Guides in isolation, but through careful consideration of competent medical evidence in conjunction with the Guides[;]"[48]

• the physician should not simply follow the steps in the *Guides*, but incorporate exams, patient reports, tests, research, training and experience to arrive at a "fair and comprehensive result[;]"[49]

• While the *Guides* may be sufficient in some cases, the *Guides* may be insufficient at assessing impairment in other circumstances.[50]

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[46] *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 506 P.3d 283 (2022).

[47] *Id.* at 531.

[48] *Id*.

[49] *Id.* at 532.

[50] *Id*.

• A physician may opine the *Guides* provide "too narrow a view" or "understated" functional impairment, and may rely on competent medical evidence to yield a more accurate result.[51]

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BOARD MEMBER

c: (Via OSCAR)

Phillip B. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Terry J. Torline, Attorney for Kansas Workers Compensation Fund
Hon. Mark E. Kolich, Special Administrative Law Judge

[51] *Id.* at 533.